



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 5, 1993

Mr. Rodman C. Johnson
Staff Attorney
Texas Air Control Board
12124 Park 35 Circle
Austin, Texas 78753

OR93-420

Dear Mr. Johnson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 20195.

The Texas Air Control Board (the "board") has received a request for information relating to a certain paper drafted by Dr. Kathryn E. Kelly and titled "Burning Hazardous Waste in Cement Kilns: A Study of Emissions, Offsite Concentrations and Health Effects in Midlothian, Texas." Specifically, the requestor seeks four categories of information:

1. All documents, information and data provided by TACB to Dr. Kelly, Ms. Beahler or ETI [Environmental Toxicology International, Inc.] pertaining to the cement kilns of Midlothian, Texas.
2. Internal memoranda of TACB relating to the air, soil and material samples from Midlothian, Texas for the period from, [sic] January 1991 through April 1992, including without limitation that certain memorandum from Marcia Willhite dated July 13, 1992.
3. All correspondence, memoranda, notes, computer data and records relating to any correspondence, telephone calls, meetings, telefaxes or other forms of communication between
 - (a) Dr. Kelly, Ms. Beahler or ETI, and
 - (b) TACB or yourself.
4. All correspondence from TACB or yourself to any third party relating to Dr. Kelly, Ms. Beahler or ETI.

You have submitted representative samples of the requested information to us for review. You claim that sections 3(a)(1), 3(a)(3), and 3(a)(11) of the Open Records Act except the requested information from required public disclosure.

The Open Records Act imposes a duty on governmental bodies seeking an open records decision pursuant to section 7(a) to submit that request to the attorney general within 10 days of the governmental body's receipt of the request for information. The time limitation found in section 7 is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.-Austin 1990, no writ). When a request for an open records decision is not made within the time prescribed by section 7(a), a heightened presumption of openness arises which can be overcome only by a compelling demonstration that the information should not be made public. *Id.* However, this presumption is inapplicable to information that is "confidential" under section 3(a)(1). Section 10 of the Open Records Act specifically prohibits the distribution of confidential information.

We realize that the short time frame prescribed by section 7(a) occasionally may impose a substantial burden on governmental bodies seeking to comply with the act. Accordingly, when we receive an otherwise timely request for an open records decision that lacks some information necessary for us to make a determination, it has been our policy to give the governmental body an opportunity to complete the request. On May 7, 1993, we received your request for an open records determination. In addition, you informed us that the nature of the open records request compelled you to seek additional time to submit arguments in support of nondisclosure. To date, however, we have not received your reply.

We have reviewed the information that you have submitted to us for review. You contend that the information submitted to us for review does not constitute information subject to the Open Records Act. The Open Records Act applies to "[a]ll information collected, assembled, or maintained by or for governmental bodies, except in those situations where the governmental body does not have either a right off access to or ownership of the information, pursuant to law or ordinance or in connection with the transaction of official business." V.T.C.S. art. 6252-17a, § 3(a). On their face, the documents appear to be subject to the Open Records Act, as they relate to the transaction of official business. Furthermore, the board appears to have ownership of the documents, although it does not own the copyright on the paper by Dr. Kelly and Ms. Beahler. Thus, because you have not provided us with any reasons to believe to the contrary, we must assume that the requested records are governmental records within the meaning of section 3(a) and therefore are subject to the Open Records Act.

You claim that section 3(a)(1) excepts the documents that you have submitted to us for review from required public disclosure. Section 3(a)(1) excepts "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." We have examined the documents and do not find anything on the face of the records that indicates that they are "confidential by law, either Constitutional, statutory, or by judicial decision."¹ Because, however, you have not provided the promised brief which might indicate why these records are confidential, we are closing the file without a finding. The person requesting the information in your custody may pursue such remedies as may be appropriate. See V.T.C.S. art. 6252-17a, § 8. While we cannot direct you to disclose information that is confidential under the law, neither can we provide you with an opinion upon which you can rely as an affirmative defense to prosecution under section 10(c)(1) of the Open Records Act.

You also claim that section 3(a)(3) excepts the requested information from required public disclosure. See Open Records Decision Nos. 551 (1990) (stating that section 3(a)(3) applies to information relating to pending or reasonably anticipated litigation to which governmental body is party). We note from the letter from the requestor that some administrative hearings are pending involving governmental bodies in various states and the author of the requested article; however, the board does not appear to be a party to these hearings. You have not provided us with any facts indicating that the board reasonably may anticipate litigation in this matter. We thus have no basis on which to conclude that the board may withhold the requested information under section 3(a)(3) of the Open Records Act. Accordingly, section 3(a)(3) does not authorize the board to withhold the requested information.

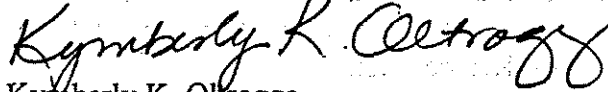
You also claim that the requested information constitutes "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency" under section 3(a)(11) of the act and, therefore, is excepted from public disclosure. Because you have failed to timely submit information necessary to us to make a determination, we conclude that you have waived your right to assert the section 3(a)(11) exception. Accordingly, the board may not withhold the requested information under section 3(a)(11) of the Open Records Act.

Finally, you request that this office consider whether any other exceptions apply to the requested information. This office will raise *sua sponte* only nondiscretionary exceptions. See Open Records Decision No. 325 (1982). Based on our review of the documents, we find no nondiscretionary exceptions that prohibit the release of this information. Should you at some future date request that this matter be reopened and considered, we will not consider your request timely and will consider all discretionary

¹The copyrighted paper, while not confidential under section 3(a)(1), may be copied only in accordance with the federal copyright law. Attorney General Opinion MW-307 (1981).

exceptions to required public disclosure waived unless you can demonstrate compelling reasons why the information should not be released. *See Hancock*, 797 S.W.2d at 381. In the absence of such a compelling demonstration, we find that you have not met your burden under the heightened presumption of openness and must release the requested information unless prohibited to do so by law. If you have questions about this ruling, please contact this office.

Yours very truly,



Kimberly K. Oltrogge
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Opinion Committee

KKO/GCK/jmn

Ref.: ID# 20195
ID# 20236

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